

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**JOSEPH A. PANACCI,
Claimant Below, Petitioner**

FILED
June 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**v.) No. 100795 (Claim No. 2008023177)
(Board of Review No. 2043886)**

**WEST VIRGINIA OFFICE OF THE
INSURANCE COMMISSIONER AND
WHEELING-PITTSBURGH STEEL CORPORATION,
Respondents**

MEMORANDUM DECISION

This workers' compensation claim is before this Court upon the appeal of claimant Joseph A. Panacci from the May 25, 2010, order of the West Virginia Workers' Compensation Board of Review. That order affirmed a November 24, 2009, order of the Workers' Compensation Office of Judges which affirmed the findings and conclusions of the Claims Administrator's decision: (1) to deny reopening of the claim; (2) to deny temporary total disability benefits; (3) to again deny reopening of the claim¹; (4) to deny authorization for a consultation with Dr. Peter Brooks; and (5) to deny the addition of Diagnosis Code 415.19, pulmonary embolism, as a compensable component of the claim.

Upon review, this Court concludes that the decision of the Board of Review should be reversed. Accordingly, the order of the West Virginia Board of Review, dated May 25, 2010, in claim no. 2008023177, Workers' Compensation Board of Review no. 2043886, is reversed and remanded with directions as specified below.

I.

On December 7, 2007, Joseph A. Panacci (hereinafter "Claimant") was injured when he slipped and fell on ice and snow-covered stairs at work. He was first treated by Dr. Michael Kovalick, the company doctor. The claim was held compensable for a left hip contusion.

¹The Claims Administrator denied a reopening of the claim on two occasions, November 20, 2008, and December 11, 2008.

The Claimant was later examined by Dr. Capito. Dr. Capito documented degenerative joint disease and found a left hip contusion. The Claimant's December 10, 2007, MRI revealed no evidence of fracture. Dr. Capito then referred the Claimant to Dr. Peter Brooks who diagnosed the Claimant with degenerative joint disease of the left hip, aggravated by his fall on December 7, 2007.

Upon Dr. Brooks' suggestion, the Claimant underwent a Birmingham left hip resurfacing procedure on July 23, 2008. Following the procedure, the Claimant developed a deep vein thrombosis of his lower left leg, which resulted in a pulmonary embolism.

On November 4, 2008, the Claimant requested temporary total disability. The Claimant's diagnosis included "osteoarthritis unspecified." The Claimant's physician, Dr. Brooks, requested right hip surgery and noted right hip osteoarthritis with pain and limited mobility. Dr. Brooks' suggested plan for treatment included a right hip replacement. Those requests to reopen the claim and include the right hip as part of the compensable condition were denied by the Claims Administrator on November 20, 2008.

On November 19, 2008, the Claimant submitted a Claim Reopening Application for temporary total disability benefits from Dr. Capito. In the same application, authorization was requested for the Claimant to see Dr. Books for the right hip condition. On December 11, 2008, the requests were denied by the Claims Administrator.

A February 2, 2009, letter requesting the addition of a pulmonary embolism (Diagnosis Code 415.19) to the claim was received by the Claims Administrator. However, on February 4, 2009, the request to add pulmonary embolism as a compensable component of the Claimant's claim was denied.

II.

In his appeal to this Court, the Claimant contends that the Board of Review should be reversed because an aggravation or progression of his compensable injury occurred which warranted a reopening of the claim for temporary total disability and medical treatment. Further, the Claimant argues that the pulmonary embolism should be included in this claim because it is reasonably related to the compensable injury. Lastly, the Claimant asserts that a consultation with Dr. Brooks as to the right hip should have been approved.

In support of his argument, the Claimant states that his previous left hip osteoarthritis does not negate coverage under this claim because a "compensable

injury occurs where there is an aggravation of a preexisting condition because of one's employment." According to the Claimant, those circumstances are present here.

The employer argues that the Claimant's denial of hip problems prior to his December 7, 2007, injury is belied by his medical records. A 2003 x-ray of the Claimant reveals the existence of a hypertrophic degenerative osteoarthritis process of the left hip. Anti-inflammatory medication was prescribed in May 2003. Also, a 2003 letter from Dr. Stephen Alatis states that the Claimant had been experiencing hip pain for six months.

Dr. Victoria Langa evaluated the Claimant at the employer's request. Dr. Langa opined that the only reason for the Claimant to have proceeded directly with left hip resurfacing surgery after his 2007 work-related injury would have been if he had been symptomatic all along as a result of his degenerative joint disease. Dr. Langa therefore concluded that the Claimant's left hip surgery had no relationship to his accident at work on December 7, 2007. The pulmonary embolism, in turn, was related to the left hip surgery; therefore, it too was unrelated to the Claimant's workers' compensation claim.

The employer thus asserts that the only compensable component in this claim is a left hip contusion and argues that the Claimant did not need any surgery for that condition.

This Court follows *W. Va. Code*, 23-4-1g(a) [2003], passed by the West Virginia Legislature when reviewing Workers' Compensation cases. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

Upon review, this Court concludes that the assertions of the Claimant are well justified. The Board of Review's findings are not supported by the medical evidence of record. The Claimant presented evidence establishing a direct link between his work-related injury and his symptoms, conditions and requested administrative relief. The record demonstrates an aggravation or progression of the Claimant's preexisting condition caused by the December 7, 2007, accident.

The left hip contusion due to the accident was found to be compensable. The Birmingham resurfacing procedure on the Claimant's left hip, the subsequent pulmonary embolism, the requests for temporary total disability and the request for further consultation with Dr. Brooks regarding continued hip difficulty are interconnected, as shown by the evidence, with the December 7, 2007, work-related accident and are compensable. That interconnection can be seen, in part, in the conclusion of Dr. Langa that the pulmonary embolism resulted from the Birmingham procedure on the Claimant's left hip. In that regard, this Court notes Dr. Brooks' comment that the Claimant's pre-existing condition in the left hip was aggravated by the compensable injury.

III

Accordingly, the order of the Workers' Compensation Board of Review dated May 25, 2010, in Workers' Compensation claim no. 2008023177, Workers' Compensation Board of Review no. 2043886, is reversed as it is clearly wrong and based upon a misstatement of the evidentiary record, and this case is remanded to the Workers' Compensation Board of Review with directions to enter an order:

1. granting the requests of the Claimant to reopen the claim;
2. granting the request of the Claimant to add Diagnosis Code 415.19, pulmonary embolism, as a compensable component of the claim;
3. granting the Claimant's request for authorization for a consultation with Dr. Brooks concerning the Claimant's right hip; and
4. granting the Claimant's request for temporary total disability benefits as warranted by the medical evidence.

Reversed and Remanded.

ISSUED: June 14, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Thomas E. McHugh
Justice Brent D. Benjamin